

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA ROY BRISTOW,

Defendant and Appellant.

F039418

(Super. Ct. No. 25845)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. William T. Ivey, Judge.¹

Shama H. Mesiwala, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stan Cross and Brian G. Smiley, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

¹ Retired judge of the Merced Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

STATEMENT OF THE CASE

On March 7, 2001, appellant Joshua Roy Bristow's jury trial began in the Superior Court of Merced County for two counts of robbery and firearm enhancements. The court declared a mistrial when it was determined the police department failed to provide the defense with notes of witness interviews. A second trial was set but the court dismissed the charges.

On May 25, 2001, an information was filed in the Superior Court of Merced County charging appellant with two counts of robbery (Pen. Code,² § 211), with enhancements for personal use of a firearm (§ 12022.53, subd. (b), § 12022.5, subd. (a)(1)). Appellant pleaded not guilty and denied the enhancements.

On May 29, 2001, appellant moved to dismiss the information for outrageous police conduct, based on the police department's failure to disclose information to the defense. On or about May 31, 2001, the prosecution filed opposition.

The court denied appellant's motion to dismiss on August 1, 2001. Appellant's second jury trial thereafter began. On August 7, 2001, defense counsel informed the court that he had still not received all the police department's reports, and moved to dismiss the case. The court denied the motion without prejudice. On August 8, 2001, the court granted appellant's motion for mistrial and found the prosecution had failed to turn over evidence to the defense.

On August 29, 2001, appellant's third jury trial began. On September 5, 2001, the prosecution moved to dismiss the section 12022.5 enhancement, and only proceeded on the section 12022.53 enhancement. On September 7, 2001, the jury found appellant guilty as charged of two counts of robbery, and that he personally used a firearm in the commission of the offenses.

² All further statutory references are to the Penal Code unless otherwise indicated.

On October 9, 2001, appellant moved to dismiss his convictions for outrageous police conduct, based on the police department's previous failure to turn over evidence. Appellant also moved for a new trial based on insufficient evidence. On November 2 and 14, 2001, the prosecution filed opposition to appellant's motions to dismiss and for new trial.

On November 20, 2001, the parties submitted the matters and the court denied appellant's motions to dismiss and for new trial. The court denied probation and imposed an aggregate term of 26 years in state prison as follows: as to count I, robbery, the upper term of five years, with the consecutive term of 10 years for personal use of a firearm; as to count II, robbery, a consecutive one-year term (one-third the midterm), with a consecutive term of 10 years for personal use of a firearm.

On or about November 26, 2001, appellant filed a notice of appeal.

On February 5, 2002, the prosecution moved to recall the sentence because the enhancement for count II should have been three years four months, representing one-third the term. On February 19, 2001, the court conducted a hearing on the motion and amended the enhancement for count I to three years four months, for appellant's aggregate term to be 19 years 4 months.³

FACTS

On the afternoon of May 11, 2000, the County Bank in Dos Palos was robbed by a single man carrying a handgun, who made off with almost \$14,000. The investigation quickly focused on appellant, who was subsequently arrested and charged with robbery. Appellant's first jury trial ended in a mistrial when the court learned the police

³ Respondent notes the court should have reduced the enhancement as to count II instead of count I, and requests this court to correct the abstract of judgment. The abstract will be so corrected.

department failed to turn over all their investigative notes to the defense. Appellant's second jury trial also ended in a mistrial because of the police department's continuing failure to turn over certain investigative reports.

The instant appeal is from appellant's third jury trial, which resulted in his conviction for two counts of robbery and firearm enhancements, and a sentence of 19 years 4 months in prison. On appeal, appellant asserts the court should have granted his posttrial motion to dismiss because the police department failed to preserve evidence, namely a handgun which the police found at appellant's residence but did not seize.

The Robbery

The County Bank in Dos Palos is located near Dos Palos High School. A parking lot is directly behind the bank and adjacent to Lucerne Avenue, which ends at a canal bank. There is a "weir" across the canal bank to control the water flow, which is also used by pedestrians to cross the canal. The eastern side of Lucerne Avenue is adjacent to the high school, and Blossom Street borders the northern side of the high school. The bank is across the street from Bubbles Beauty Salon.

On April 7, 2000, appellant opened an account at the County Bank and deposited \$700. The account was overdrawn by \$63 at the end of the month.

At 12:30 p.m. on April 20, 2000, Leanne Croker was at the beauty salon having her nails done. She looked out the window toward the bank and noticed a silver Thunderbird and a red car were repeatedly driving around the bank. The two cars parked near the bank, and three men emerged and walked around the bank about 10 times. Croker described one man as Hispanic with a medium build, another was Black with a medium to large build, and the third was White and shorter than the other two men. Either the Hispanic or Black man carried a black duffel bag. Croker believed the men drove and walked around the bank for 45 minutes and were very suspicious. She was going to report the incident to the police department but forgot about it.

On May 10, 2000, appellant tried to use his ATM card but the bank had blocked its use because his account was overdrawn.

On May 11, 2000, Shannon Inacio and Laura Greenlee were working at the bank. They were at a teller station, counting the cash in the ATM cassettes and wrapping the cash bundles in paper straps. There were several other employees in the bank, including Judy Adkins, Sharon Johnson, Chrissy Maldonado, and Norma Robertson.

At approximately 2:30 p.m., a man entered the bank and walked directly to the teller station where Inacio and Greenlee were working. Inacio testified she heard a noise and noticed a backpack had been thrown over the teller's counter and landed on the floor on the other side of the counter. Inacio looked up and saw a man holding a gun. Inacio described the gunman as about her height of five feet two inches, slender, not very broad, and thin. Inacio thought he was a teenager and Caucasian. The gunman was wearing a navy blue hooded sweatshirt, silver sunglasses, and baggie pants. Inacio testified the gunman's face was covered because the hood was pulled down over his hair and he had a bandana across his mouth, which was tucked in his shirt. The gunman was also wearing clear latex gloves on his hands. Inacio did not have much experience with guns, and described the gunman's weapon as "just a silver metal" gun which was pointed right at her.

Greenlee also described the gunman as wearing a blue hooded sweatshirt and blue baggie pants. He was wearing sunglasses, a blue bandana completely covered his face, and latex gloves were on his hands. Greenlee testified his skin appeared white under the clear gloves. Greenlee described the weapon as a "normal gun. It was silver, shiny silver." She did not have any experience with firearms and had never before seen a gun. Greenlee thought the gunman was "just a little shorter" than her height of five feet seven inches. He had a small frame and was not stocky.

Greenlee and Inacio described the backpack as a regular one which a student would carry. It was green khaki with straps, and black on the bottom. It was very plain and lacked any netting or design.

Inacio and Greenlee testified the suspect pointed the gun directly at them. They had never been robbed before and were afraid. Inacio testified that when the backpack hit the ground, the gunman told her, ““Fill it up.”” Inacio placed about \$14,000 in the backpack from the cash which she had already removed and counted from the ATM. The \$20 bills were collected in \$2,000 bundles and wrapped in purple and white stickers. The smaller denominations were in \$500 bundles. Inacio also placed some loose, unbundled bills in the backpack. Inacio testified she had already removed the “bait money” from the ATM as she was counting the currency and, as a result, she was unable to place any marked currency in the backpack.

After Inacio filled up the backpack with currency, she placed it on the counter. The gunman picked it up and shook it, then said he wanted the money from the register. Inacio replied that she didn’t have a register at that station and that was it. The gunman carried the backpack and walked out of the bank’s back door.

Inacio testified the entire incident lasted just a couple of minutes. She never saw the gunman’s face, and she was unable to identify anyone as the gunman. Greenlee was similarly unable to identify anyone as the robbery suspect.

Sharon Johnson, the bank manager, subsequently determined the gunman obtained \$13,935 during the robbery. She did not know which denominations were taken, but the \$20 bills from the ATM would have been wrapped in bundles of 100, for a total of \$2,000 in each bundle. The \$5 bills were in bundles of \$500. Each bundle was wrapped with paper straps which were printed with the denomination and total amount in the bundle.

Michael Lemos was the assistant softball coach at Dos Palos High School. On the afternoon of May 11, 2000, Lemos was getting ready for a softball game when he

realized he had forgotten something at his house. He left the high school and drove home to retrieve the item. Lemos testified that at approximately 2:45 p.m., he stopped at the intersection of Blossom Street and Lucerne when he noticed a silver Thunderbird was speeding on Marguerite Street. Lemos continued to watch the silver vehicle as it turned on Lucerne.⁴ Lemos then saw a man running on Lucerne near the intersection at Blossom. Lemos testified the man was pretty short and his face was covered. He was wearing a blue sweatshirt and baggie pants. Lemos testified the man was running at full speed and heading toward the silver Thunderbird. The vehicle slowed down as the man approached it. The man ran beside the vehicle, threw something into the passenger side of the car, and continued to run down Lucerne. Lemos couldn't identify the man who was running down the street.

Lemos testified the silver Thunderbird turned on Blossom in front of the high school and left the area at a high rate of speed, about 70 miles per hour. Lemos was still at the intersection as the vehicle drove past him. Lemos testified he recognized the driver as Edgar Pounds. Lemos actually made eye contact with Pounds, who looked "kinda stunned that somebody knew him and recognized him."

James Maxey worked at the Pizza Factory in Dos Palos, located across the street from the bank. Maxey testified appellant arrived at the restaurant around 2:20 p.m. on May 11, and spoke with Maxey for a few minutes. Maxey was doing his homework and they talked about his books for a while. Maxey testified they agreed to go to the Merced Mall when Maxey was paid later in the month. Appellant was wearing a dark shirt and nylon athletic pants. Maxey testified that about five minutes after appellant left the

⁴ Lemos initially testified that he saw the silver Thunderbird around 2:20 p.m. On cross-examination, he admitted that he previously testified he saw the car around 2:45 p.m. Lemos conceded he wasn't absolutely sure about the time but it was shortly before the softball game started.

restaurant, he noticed the police cars responding to the bank and learned about the robbery.

The Investigation

All members of the Dos Palos Police Department on duty at that time, responded to the robbery dispatch from County Bank, which was the first bank robbery in the city's history. The officers included Chief of Police Tacheira, Sergeant Eric Simmons, Detective Paul Lopez, and Officer Lisa Schnoor. Several FBI agents also responded to the bank to conduct the investigation. The police found one latex glove in the parking lot directly behind the bank, and two more gloves on the canal bank, east of Lucerne Avenue.

Sergeant Simmons responded to the bank that afternoon, and compiled a report about his investigation and observations. According to his report, Officer Schnoor was the school resource officer but the first officer to respond to the robbery dispatch. She secured the scene and controlled the witnesses until the other officers arrived. She was also in charge of collecting statements from the primary witnesses. She was eventually relieved by FBI agents. Simmons testified he determined the robbery suspect used a revolver or a smaller weapon which was chrome in color.

Detective Lopez testified he briefly spoke with Shannon Inacio and Laura Greenlee at the bank. They both stated the gunman was five feet two inches tall, and they thought the gun was fake because they could see lines of molding on the sides of the weapon.

Shannon Inacio testified she spoke to Officer Schnoor and an FBI agent at the bank on the day of the robbery. Officer Schnoor interviewed her about 20 minutes after the robbery, and asked for her account of the incident. Inacio gave Officer Schnoor a description of the suspect's clothes and his gun. Some of the other tellers were present when Inacio spoke to Officer Schnoor. Inacio testified Officer Schnoor took notes as she conducted the interview. Inacio spoke to both the police officers and FBI agents about

the gunman's weapon. Inacio testified she never told the police that she thought the gun might have been a toy, or that she could see mold lines on the side of the gun. Inacio also testified she never told the police the suspect was Hispanic.

Inacio did not recall speaking with Chief Tacheira on the day of the robbery. Inacio believed she spoke with Detective Lopez the day after the robbery, and gave him a description of the suspect and an account of the robbery. Officer Schnoor was present during this interview, and either Lopez or Schnoor took notes.

Greenlee testified she spoke with Officer Schnoor and another officer at the bank immediately after the robbery, and she described the suspect and the incident. Greenlee testified Officer Schnoor took notes as she described the robbery. Greenlee also spoke with FBI agents, but she did not recall speaking to Chief Tacheira at the bank. Greenlee conceded she told Officer Schnoor the suspect appeared White and his gun looked fake. Greenlee did not recall saying that she could see lines on the side of the gun. While Greenlee thought the gun looked fake, she was still afraid during the robbery because of the possibility the gun was real. Greenlee testified she wasn't sure whether the gun was real or fake.

Officer Robert Howard also responded to the bank, and was directed by Chief Tacheira to drive around the area and look for anything suspicious. Around 3:00 p.m., Officer Howard was driving southbound on Dos Palos Avenue when he saw a silver Thunderbird in the northbound lane. As he passed the vehicle, he recognized appellant in the driver's seat and Edgar Pounds in the front passenger seat. Howard realized he had seen them earlier in the day, around 10:30 a.m., at a liquor store, when they had parked next to Howard's patrol car in front of the liquor store. They both left the car and walked toward the store, but Pounds stopped and returned to the car. Appellant continued into the store, and he was wearing a blue hooded sweatshirt and black pants. When Howard saw them in the silver car that afternoon, after the bank robbery, he recalled his

observations from that morning and realized appellant's clothing matched the description of the robbery suspect.

Michael Lemos testified that after he observed Edgar Pounds in the silver Thunderbird, he returned to the high school for the softball game. Within five minutes of his return, Officer Howard arrived on the field and asked the coaches if they saw anything unusual. Lemos spoke privately to Officer Howard and told him about Edgar Pounds, the silver Thunderbird, and the man running on the street.

Sergeant Simmons testified he had known appellant Josh Bristow for about 10 years, and described appellant as someone the Dos Palos Police Department was familiar with. Simmons contacted appellant's parole agent and determined appellant was subject to a search condition. Appellant lived in Dos Palos with his grandparents.

Sergeant Simmons testified he went to the residence where appellant lived with his grandparents on three occasions on May 11, the day of the robbery. Appellant wasn't home on the first visit. Simmons spoke with appellant's grandfather and asked to have appellant call when he got home. Simmons testified appellant called him later in the afternoon and said he was home. Sergeant Simmons contacted appellant at the residence about six hours after the robbery. Simmons was accompanied by Chief Tacheira, Detective Lopez, and Officer Schnoor. Simmons spoke to both appellant and his grandfather, and they consented to a search of the house. Appellant's grandfather escorted the officers through the house, and the officers conducted a partial search.

Simmons testified Fernando Ramirez, appellant's friend, arrived at the house while the officers were there. Ramirez was driving appellant's car, a silver Thunderbird. Simmons asked appellant and Ramirez if they would go to the police station for interviews. They agreed and the officers drove appellant to the station while Ramirez followed in appellant's car.

Detective Lopez interviewed appellant at the station and asked about the bank robbery. Appellant denied responsibility for the robbery. Lopez confirmed appellant had

been at Pizza Factory that day, and took some photographs of appellant. Appellant also complied with Sergeant Simmons's request for a saliva/DNA sample, and chewed on a cotton pad.

The officers searched appellant's car on May 11, and found numerous purchase receipts and a black-handled knife with a serrated edge. They also found a white latex glove in the vehicle's glove compartment.

Sergeant Simmons testified the officers went to appellant's residence for the third time to search the house for the robbery weapon. The third visit occurred in the evening, after they conducted the interviews at the station. The search was conducted pursuant to the grandfather's consent. Simmons testified he found a chrome-colored revolver in the house, but did not testify as to where he found it. Simmons described the weapon as in "pretty bad condition," with "pits and what appeared to be rusting" on the surface. Willie Silva, appellant's grandfather, was present when Simmons found the revolver and demonstrated the cylinder didn't properly function.

Simmons did not locate any other evidence at appellant's residence, and failed to tell Detective Lopez that he found a gun in the house. Detective Lopez only knew that a gun cabinet was in the house, and he didn't know that Simmons actually found a gun.

Sergeant Simmons admitted he did not seize the revolver even though he knew appellant had a parole search condition. Simmons testified he didn't know which individual was the suspect, and preferred to seize the weapon with a warrant. Simmons was familiar with appellant's grandfather, and accepted his promise to make the weapon available to the police upon request. Simmons admitted he considered appellant as a suspect in the bank robbery, based on the witness descriptions and the security camera videotape. However, Simmons testified he was hesitant to connect the gun with the bank robbery and "would have been much more comfortable . . . having the situation reviewed by a judge." Simmons also admitted that he could have contacted a judge and obtained a telephonic warrant that day, but he failed to do so.

Appellant was not arrested on May 11, 2000.

Appellant's Purchases

At trial, the prosecution presented several witnesses who worked at stores in Merced and Los Banos, who testified about several large purchases made by appellant on and after May 11, 2000. These witnesses positively identified appellant from photographic lineups as the person who made these purchases. Appellant did not deny making these purchases, and the defense even introduced additional evidence concerning his shopping trips.

On the afternoon of May 11, 2000, appellant purchased some jackets and clothing at Footlocker in the Merced Mall for \$101.88. Sal Ornelas, the clerk, testified appellant paid in cash, using \$20 and \$1 bills. Appellant purchased basketball shoes at Foot Action, paid cash, and only used \$20 bills. The clerk testified appellant later returned to the store to purchase clothing, and again used cash. Appellant made two purchases from Circuit City. He bought a cell phone for \$149.99, and car stereo equipment for \$485.17. Paul Merrill, the clerk, testified appellant had "a lot of money rolled up" and paid cash for the cell phone, primarily with \$20 bills. Appellant went to Fashion Zone and spent \$32.18. He went to Sam Goody's with Fernando Ramirez, who spent \$60 at the store. Appellant went to Miller's Outpost and spent \$141.

Appellant went to the tire department at Sears Automotive in Merced and purchased tires for \$485. Irma Mendoza, the clerk, testified appellant was accompanied by a man who was "pretty big and . . . heavy-set." Appellant offered to immediately pay and produced "a wad of money" that was "[p]retty big," and consisted of \$20 bills. Ms. Mendoza explained he could pay the bill after the work was completed. Appellant left the car at Sears for the work, but left behind a package of CDs which he had just purchased. Ms. Mendoza was able to return the package to appellant.

At some point after May 11, appellant went to Crescent Jewelers in Los Banos and purchased a 14-karat gold nugget watch for \$1,599. Michele Brown, the clerk, testified appellant paid \$500 cash, and opened a credit account to pay the balance.

Michael Lemos, the softball coach at Dos Palos High School who saw Edgar Pounds and the man in the blue hood, also worked at the Sports Fan store in the Merced Mall. Lemos testified that on May 12, 2000, he was working at the store when appellant arrived with Edgar Pounds and two Hispanic men. One Hispanic man was heavyset, and the other Hispanic man was about the same size as appellant but shorter than Pounds. Lemos knew appellant and immediately recognized him. Appellant purchased a leather sports jacket for \$140 or \$150, and paid with \$20 bills. Lemos tried to interest appellant in buying a sports watch. Appellant said he wasn't interested because he had just purchased a watch. Appellant showed Lemos the watch he was wearing, which was gold with a single diamond on the face. Lemos testified appellant pulled a wad of \$20 bills from his pocket and paid for the sports jacket with these bills. Appellant was carrying bags from some other stores in the mall. Lemos saw appellant later that day walking through the mall.

James Maxey testified he went to the mall with appellant on May 16, which was when Maxey received his paycheck from the restaurant. Appellant was wearing a necklace but Maxey didn't notice a new watch. Appellant purchased a money order for \$500, and told Maxey he was going to buy a phone. Maxey had heard about the bank robbery and asked appellant if he did it. Appellant replied he didn't do it.

Also on May 16, 2000, appellant went to Sound Encounters and placed a work order for the custom installation of speakers inside his car for \$935.22. He paid \$225 cash as a downpayment.

On May 17, 2000, appellant was stopped by the California Highway Patrol (CHP) for speeding, and found in possession of \$1,300 to \$1,500 in cash. He had \$200 in \$20 bills, and the rest in mixed denominations of \$50 and \$100 bills. The large bills were in

the trunk of his car, and placed inside an envelope from Libery Insurance. The rest of the money was in separate locations in the car. After the traffic stop, Detective Lopez contacted appellant and asked him to the station for questioning. Appellant voluntarily appeared, answered questions, and was allowed to leave with the money.

At trial, it was stipulated that appellant filed a disability claim with Liberty Mutual Insurance Company. The insurance company mailed appellant a check on April 28, 2000, for \$883.92, and mailed another check to him on May 10, 2000 for \$426.68.

On May 18, 2000, appellant contacted Ron Keeler, his parole agent, and made a restitution payment of \$100 in \$5 and \$20 bills. Keeler considered this payment “substantial” because appellant usually paid \$10 per month and this was “more than he had ever given me” at one time.

Also on May 18, appellant returned to Sound Encounters and paid the balance of \$710.22 in cash, and left his car there for the work. Appellant had ordered tinted windows, but instead decided to get a radar detector because he was getting a lot of speeding tickets. Richard Cagle, the clerk, gave appellant a ride home and they stopped at Wal-Mart, where appellant spent \$150 to \$200 cash for “paint gun stuff.”

Tonya Hernandez and her boyfriend were friends with appellant. Tonya testified that appellant contacted them early in May, before she heard about the bank robbery, and asked for a loan. Appellant said he was short on cash and had to make a car payment, but they did not loan him any money. Tonya testified she saw appellant after she heard about the robbery, and he was wearing jewelry she had never seen before.

Further Investigation and Edgar Pounds’s Statement

On May 25, 2000, Detective Lopez interviewed Fernando Ramirez, who implicated appellant as the robbery suspect.

On May 26, 2000, appellant was arrested and his car impounded. He was charged with two counts of robbery, with special allegations for personal use of a firearm.

Also on May 26, Edgar Pounds was arrested and interviewed by Detective Lopez. The interview was tape-recorded, and the tape was played for the jury at trial and the transcript admitted into evidence. Lopez advised Pounds of the *Miranda*⁵ warnings, and Pounds agreed to give a statement. Lopez told Pounds that a witness identified him as driving appellant's car near the bank shortly after the robbery, and a man threw a bag into the car as Pounds drove away. Lopez asked Pounds to tell the truth about the robbery, and Pounds proceeded to discuss appellant's involvement.

Pounds stated he walked to appellant's house on the morning of May 11, and they drove around in appellant's silver car. Pounds dropped off appellant at the Pizza Factory because he wanted to talk to James Maxey. Appellant was wearing a blue hooded sweater over a black Nike shirt. Pounds drove around and saw some friends, then returned to the restaurant but appellant wasn't there. Pounds drove around the block, near the high school, and saw appellant running down the street. Appellant threw a black and brown bag into the car and ran toward the canal bank. Appellant had his hood over his head and was wearing dark glasses when he threw the bag in the car. Pounds looked at the bag and turned the car around, and caught up with appellant on the street. Pounds gave the bag to appellant and asked if appellant was going to take him home. Appellant kept running and Pounds finally caught up with him at appellant's house. Appellant was only wearing the Nike shirt and did not have the blue hooded sweater.

Detective Lopez expressed his disbelief that Pounds didn't know appellant was going to rob the bank. Pounds replied appellant never said he was going to rob a bank, but appellant said he was tired of being broke and he needed some money. Earlier that day, appellant asked Pounds for money to fill up his car with gas. After they filled up the car, they drove around and "bumped into a couple of cops on that day," including Officer

⁵ *Miranda v. Arizona* (1966) 384 U.S. 436

Howard at the liquor store. Pounds insisted all he did was drive around after he dropped off appellant, and he didn't know what appellant was going to do. He saw appellant running down the street, appellant threw the bag in the car, and he kept running.

Pounds stated that when he caught up with appellant at his house, Pounds told appellant that he needed to go home. Appellant had already changed his socks in the house because his feet were muddy. Appellant took the bag out of the car and said he needed a few minutes, and walked through the side fence with the bag. This side fence was next to Fernando Ramirez's house. Pounds moved to the passenger seat and appellant returned to the car.

Pounds stated he didn't ask appellant about the bag, and Detective Lopez expressed his disbelief and again asked Pounds to tell the truth. Pounds said he didn't know appellant was going to rob the bank, and he didn't walk into the bank with a gun. However, Pounds admitted he later received \$200 from appellant's girlfriend, who was related to Fernando Ramirez. Appellant told Pounds to meet the girl because she would have his money. The money was in \$5 and \$20 bills. Appellant owed Pounds \$62 but the girl gave him \$200, and Pounds didn't understand why appellant gave him that much.

Pounds repeatedly insisted he didn't know appellant was going to commit a robbery. Detective Lopez advised him not to throw away his life. Pounds replied, "Maybe I got involved and I didn't know...." Pounds again said appellant just threw the bag into the car and he didn't look inside it. Pounds admitted he later thought appellant had robbed the bank. On the day of the robbery, after the police interviewed appellant, appellant invited Pounds to get something to eat. Pounds replied that appellant didn't have any money. "Now, once I say yeah I'm hungry and get to helping him spend his money that throws me into it. That puts me deeper...." Pounds refused appellant's dinner offer because he didn't want to be involved with the stolen money. However, Pounds admitted that he and his friends had recently made some purchases.

Detective Lopez ended the interview and asked Pounds if he wanted to say anything else. Pounds said, “Josh robbed the bank, I didn’t do it, I didn’t have nothing to do with it, I didn’t know about it, he did it.” Appellant didn’t tell Pounds he did it, but it was “kind of obvious now. I mean, the bank has been robbed and you guys haven’t arrested nobody taken to jail but he’s steady buying all these (unintelligible) jewelry.” Pounds knew appellant purchased jewelry, clothing, and other items after the bank robbery, and again insisted he didn’t know appellant was going to rob the bank. Pounds said he didn’t know “until recently” that appellant robbed the bank.

On June 1, 2000, the residence of appellant’s grandfather was searched pursuant to a warrant. The officers did not find a gun, but recovered receipts for appellant’s recent purchases. They also found newspaper articles in appellant’s bedroom about the bank robbery. Detective Lopez took photographs of these articles but did not seize them because he believed they were beyond the scope of the warrant. However, Lopez conceded the search warrant provided for the seizure of any evidence which might prove or disprove the identity of the robbery suspects.

On June 2, 2000, Leanne Croker informed the police about her observations of the three men walking around the bank in April. She had remembered the incident after she heard about the bank robbery. She was shown photographic lineups and positively identified the three men who walked around the bank. At trial, she testified appellant was one of the men who drove and walked around the bank on April 20, 2000.

Trial Testimony

The latex gloves found in the bank’s parking lot, the canal bank, and appellant’s car were sent to the Department of Justice laboratory for comparison with appellant’s DNA sample. There was no evidence that a match was made. The police never found any of the stolen cash, the brown backpack, the robber’s blue sweatshirt, or any other physical evidence. The prosecution introduced photographs of the bank robbery from the bank’s security camera.

Ron Keeler was appellant's California Youth Authority (CYA) parole agent. Appellant had been discharged from CYA on parole in February 1998, for possession of stolen property, trespassing, false representation, two counts of receiving stolen property, and five counts of burglary. Appellant performed well on parole, had one speeding ticket, and went to school and worked. Appellant was required to make monthly payments of \$10 as part of his parole. He usually made the required payments, and once made a \$30 payment. He stopped making payments in January 2000, because he suffered an injury, went on disability, and quit his job.

Keeler testified that if a handgun was in the residence where appellant lived with his grandparents, it was possibly a parole violation depending on the exact location of the weapon in the house.

Edgar Pounds testified for the prosecution under a grant of immunity. Pounds and appellant were friends in high school, and he was with appellant on the morning of May 11, 2000. They drove around all day in appellant's silver Thunderbird. They stopped for gasoline, and appellant asked Pounds for a loan to put \$2 of gasoline in the tank. Pounds gave appellant \$2 for the fuel.

Pounds testified that he dropped off appellant at the Pizza Factory around 2:00 p.m. Appellant was wearing blue Nike sweat pants, black and white sandals, and a silkish shirt with the Nike swoosh. Appellant told Pounds to pick him up in 10 minutes because he wanted to speak with James Maxey. Pounds kept appellant's car and drove around town "for a minute or two back and forth, I mean turning corners." Pounds picked up some friends and dropped them off. Pounds returned to the Pizza Factory, and picked up appellant at a fitness gym which was next to the restaurant.

At trial, Pounds admitted Detective Lopez interviewed him about the robbery, and he gave an extensive, tape-recorded statement that appellant committed the robbery. Pounds admitted he told Detective Lopez that when he dropped off appellant at the Pizza Factory, he was wearing a blue hooded sweatshirt; that Pounds drove near the high

school and saw appellant running on the street; that appellant threw a bag into the silver Thunderbird as he ran alongside the car; that Pounds drove away while appellant continued to run; and a mutual friend subsequently gave \$200 to Pounds on appellant's behalf.

Pounds testified that while he made these statements to Detective Lopez, he lied about everything because he felt intimidated when he was picked up by the police and FBI agents. Pounds further claimed Detective Lopez spoke with him before turning on the tape recorder and threatened that he would go down for the robbery and get a lot of time if he didn't implicate appellant. Pounds testified Detective Lopez talked about how the police thought appellant committed the robbery. Lopez then turned on the tape recorder and Pounds merely repeated what Lopez wanted to hear.

Pounds testified Detective Lopez advised him of the *Miranda* warnings prior to giving the statement, and Pounds repeatedly told Lopez appellant robbed the bank and he wasn't involved. However, Pounds testified he lied about these details so he wouldn't be arrested. Pounds admitted he drove near the high school on May 11, but that occurred before he dropped off appellant at the restaurant. Pounds denied that he went with appellant to the mall to purchase a lot of items.

Fernando Ramirez also testified for the prosecution under a grant of immunity. Ramirez was appellant's best friend and lived next door to him. Ramirez admitted he gave a statement to Detective Lopez which implicated appellant in the robbery. Ramirez admitted he told Lopez that he spoke with appellant on May 10, and appellant showed him a chrome gun and told him about his plans to rob the bank. Ramirez also told Lopez that he saw appellant on May 11 around 3:15 p.m.; that he shook hands and hugged appellant, and appellant said, "I did it, Bro"; that appellant showed him a brown bag and a stack of twenty dollar bills worth \$2,000, which were wrapped in pinkish bands; that appellant said he took the gun from his grandfather's cabinet and returned it;

appellant wore a bandana around his face and threw his clothes in a ditch; and appellant said he was hiding the money in his brother's car.

Ramirez testified that while he made these statements to Detective Lopez, he lied about everything and he didn't know anything about the robbery. Ramirez testified he made these statements only because Detective Lopez said he knew appellant committed the robbery, and "if I didn't say [appellant] did it I'll get fourteen years in prison." Ramirez testified Detective Lopez told him the details about the robbery, and Ramirez merely repeated the statements and claimed appellant told him the details. Ramirez admitted Lopez advised him of the *Miranda* warnings during the interview, but claimed Lopez threatened to put him in prison if he didn't implicate appellant. Ramirez admitted he went to the mall with appellant, but denied appellant gave him the details about the robbery as they were driving to the mall. Ramirez further admitted appellant had about \$400 to \$500 when they were at the mall, but denied appellant had \$2,000.

Detective Lopez testified he never threatened Edgar Pounds or instructed him as to what to say, either before or after the tape recorder was turned on. Lopez testified the tape recorder was only turned off to switch cassettes during the interview. Lopez also testified he never threatened Fernando Ramirez with 14 years in prison, or told Ramirez what he wanted to hear about the robbery. Lopez testified Ramirez described the distinctive paper straps he saw wrapped around the cash bundles. No other witness had described these straps prior to Ramirez's interview, and Lopez had never seen the straps.

Detective Lopez further testified he was involved in the investigation of appellant's juvenile case, and arrested appellant's brother in an unrelated case. Lopez admitted he referred to appellant as "'a little SOB'" during the interview with Edgar Pounds, but claimed he didn't have any personal dislike for appellant.

Also at trial, the defense extensively cross-examined the law enforcement officers to establish several missteps in the police department's handling of the case, the officers'

delayed preparation of reports about the bank robbery, and their failure to produce investigative notes to the defense.

Detective Lopez testified the residence of appellant's grandfather was searched pursuant to a warrant on June 1, 2000. Lopez acknowledged the search warrant affidavit failed to state the police found a weapon in appellant's residence during the consent search on May 11, 2000. Lopez testified the affidavit was prepared by FBI Agent Smothers, who relied on the police reports prepared by Lopez and other officers. Lopez further testified the police reports didn't mention the gun because he didn't know Sergeant Simmons had found a weapon during the May 11, 2000, consent search of appellant's residence.

Lopez testified that a few days after the robbery, he asked Officer Schnoor if she had any notes from the investigation. Schnoor gave Lopez the notes about two weeks after his request. Lopez reviewed Schnoor's notes but did not incorporate them into his reports because they didn't have "any information there that I wasn't already aware of." Lopez conceded that Schnoor's notes stated Edgar Pounds associated with Jay Thompson, but this information was not in the police report because Lopez never contacted Thompson. Lopez also conceded Schnoor's notes mentioned a goldish colored, four-door Lincoln Town Car driving "u[p]town with several small Hispanic males." Lopez did not include this information in the police report because he decided it wasn't related to the robbery investigation. Lopez conceded Schnoor's notes described the robbery suspect as a possible Hispanic male, but he didn't conduct any follow up investigation as to the Hispanics in the gold Town Car.

Detective Lopez gave Schnoor's notes to the district attorney's office in March 2001. He had forgotten about the notes and found them later in his office. The notes were not in the case file. Lopez conceded the department's standard practice was to include all investigative notes in the case file.

Detective Lopez testified he interviewed Ms. Croker about her observations from the beauty shop. Lopez conceded that Croker stated she had again seen the White suspect and the same car in front of the bank on June 2, 2000, after appellant was arrested and his car impounded.

Officer Howard testified that he saw appellant and Pounds on the morning of May 11, 2000, at a liquor store, before the robbery, and appellant was wearing a blue hooded sweatshirt and black pants. However, Officer Howard admitted he didn't prepare a report about his observations at the liquor store until April 25, 2001. Howard testified that Sergeant Simmons contacted him in March or April 2001, and asked him to prepare a report about his observations of appellant and Pounds on the morning of May 11, 2000. Howard testified about Simmons's request: "Well, first he yelled at me and then he said that really needs to be done, and he asked me the same thing you did, why wasn't it done." Howard admitted he didn't make any notes about his observations of appellant and Pounds at the liquor store, but the incident "was my first bank robbery I've ever worked in my life, and it really sticks in your mind when you have a major crime you've never worked before. It's very intense, and your memory—if you go through a situation like that, some type of episode, it's going to stick in your mind."

Sergeant Simmons testified about the consent search of appellant's grandfather's house on the evening of May 11, 2000, and that he found a revolver during that search but didn't seize it. However, Simmons didn't compile a report about the search and the discovery of the gun until June 1, 2000. In addition, Simmons acknowledged that when the department finally requested a search warrant for the grandfather's house, the affidavit failed to state that the officers found a gun at appellant's residence on May 11, 2000. When the warrant was executed at appellant's residence, the weapon Simmons had previously seen, was not found and it was never again located or produced.

Defense Evidence

Appellant testified that he was on parole from CYA for burglary, possession of stolen property, trespassing, and assault. Appellant committed these offenses when he was 11 to 14 years old. He was paroled from CYA in February 1998 when he was 16 years old. He went to school and worked at a variety of jobs. He injured his hand on March 31, 2000, while working at a welding shop, and filed a disability claim. He received the two checks from the insurance company and saved the money. He had already saved his wages from the welding shop. He was in an automobile accident in November 1999, and received an insurance claim for \$3,500 on April 6, 2000.

On April 10, 2000, appellant purchased a car from Westside Ford for \$3,500, and gave a downpayment of \$2,500 from his savings and a loan from his uncle. Appellant had saved \$4,900, from his job and the insurance payments, and he kept the money under his bed. He placed some of the money in a checking account, which he opened in April, and spent some on himself. He purchased stereo equipment for his car and paid for custom installation in his car. He bought clothes, CDs, and a watch, and made payments to his parole officer. He sold his old stereo system for \$2,200 on May 13. His mother also gave him \$600.

Appellant testified he was driving around in his silver Thunderbird on May 11, 2000, with Edgar Pounds. They bought sodas around 10:30 a.m. and bought gas for the car. Pounds did not give him any money. Around 2:15 p.m., Pounds dropped off appellant at the pizza restaurant. Appellant testified Pounds wanted to meet a girl, and appellant wanted to talk to James Maxey about going to the wrestling tournament together. Appellant admitted he was wearing a black shirt, a windbreaker, and black tennis shoes. Appellant visited with Maxey for about 15 minutes, and Pounds was waiting for him at the gym next to the restaurant. Pounds moved to the passenger side and appellant took the driver's seat. Pounds did not seem excited or say that he had just robbed a bank.

Appellant testified he never went to the bank that day, and he did not commit the robbery. He denied throwing a bag into his car as Edgar Pounds drove by him. Appellant admitted he went to the mall and several other stores on and after May 11, 2000, and made several purchases. Fernando Ramirez was with him for some of the purchases. Appellant admitted he had a lot of cash with him when the CHP stopped him for speeding, but testified the cash was from his insurance checks and savings.

Appellant was convicted of two counts of robbery, and the firearm enhancements were found true. On appeal, he contends the police violated *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*) and *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*) by failing to seize and preserve the handgun which Sergeant Simmons found at the grandfather's house during the May 11, 2000, consent search. Appellant also asserts the court committed prejudicial error when it refused his pinpoint instructions on the impact of police misconduct.

DISCUSSION

I.

FAILURE TO SEIZE THE HANDGUN

Appellant asserts the police department violated *Trombetta* and *Youngblood* when it failed to seize and preserve the handgun which Sergeant Simmons found in the residence of appellant's grandfather, during the consent search on May 11, 2000. Appellant asserts this weapon constituted exculpatory evidence because it did not match the bank tellers' description of the robbery weapon, and further testing would have eliminated the gun as the subject weapon. Appellant further asserts the police acted in bad faith in failing to seize the weapon, based on their prior failures to turn over evidence in this case. Appellant acknowledges he failed to raise *Trombetta* and *Youngblood* claims below as to the preservation of evidence, but asserts his prior motions to dismiss and for mistrial effectively preserved the issues as to whether the police should have seized and preserved the gun for further testing.

In order to address appellant's arguments, it is necessary to review the entirety of the record, including the two mistrials and the two motions to dismiss.

A. The First Mistrial

The bank robbery occurred on May 11, 2000, and appellant was charged with two counts of robbery and firearm enhancements.

On March 7, 2001, appellant's first jury trial began. According to appellant, it was learned during the testimony of witnesses that certain police officers had taken witness statements, but reports about these statements had not been provided by the prosecution. Thereafter, the police produced Officer Schnoor's handwritten notes as to her interviews with witnesses. After the notes were produced, the court declared a mistrial and determined the police department had failed to provide the defense with notes of witness interviews.

B. The Second Mistrial

On May 25, 2001, appellant was again charged with two counts of robbery and firearm enhancements.

On May 29, 2001, appellant moved to dismiss the information for "outrageous police conduct" that violated fundamental fairness and his due process rights, pursuant to *United States v. Russell* (1973) 411 U.S. 423 (*Russell*) and *People v. Thoi* (1989) 213 Cal.App.3d 689 (*Thoi*). Appellant's motion was based on the police department's failure to disclose Officer Schnoor's notes until the first trial began, nearly a year after the bank robbery. Appellant asserted that many of the details in Officer Schnoor's notes were "completely inconsistent" with the facts stated in the police department's previous reports. The notes also mentioned "alternate suspects" who had not been named in

previous reports.⁶ Appellant argued the police had intentionally concealed exculpatory information, and Schnoor's notes were only disclosed after "the deception of the police was discovered" at the first trial. Appellant further argued the delay had "severely prejudiced" him because "the memories of witnesses and those named in the notes have faded and some of those named/mentioned in said notes can no longer be found." Appellant asserted the police department's conduct had violated his due process rights, and the information should be dismissed.

The prosecution's opposition conceded that during the first trial, it was discovered the police department had failed to turn over Officer Schnoor's notes to either the prosecution or the defense. The prosecution immediately turned over the notes to appellant but a mistrial was granted. The prosecution asserted the second information should not be dismissed because appellant had time to investigate Officer Schnoor's notes, and appellant failed to demonstrate whether the notes revealed any new or exculpatory information.

The prosecution's opposition also challenged the validity of appellant's reliance on *Thoi, supra*, 213 Cal.App.3d 689, in support of his motion to dismiss. The prosecution asserted *Thoi* only applied to entrapment situations, and the separate due process claim of "outrageous police conduct" only existed outside of entrapment in the most extreme cases. The prosecution further noted that if appellant's motion "was intended to be a Trombetta motion, then he has also failed to meet his burden. A Trombetta motion is made in cases where the state has failed to preserve evidence. The burden for such a motion is quite high." The prosecution noted the standards for

⁶ Appellant's reference to "alternate suspects" concerns Officer Schnoor's notation about four Hispanics in a gold Town Car. These notations were on the same page as her notes about the bank robbery.

Trombetta and *Youngblood*, and argued there was no evidence the police department withheld exculpatory information.

The prosecution alternatively argued that appellant's motion should really be based on a discovery violation pursuant to *Brady v. Maryland* (1963) 373 U.S. 83. The prosecutor speculated appellant did not rely on a discovery violation because *Brady* did not support a pretrial dismissal under the circumstances, and appellant was trying to bootstrap his case into a due process claim through the "outrageous police conduct" theory. The prosecutor argued the first mistrial had been granted, all discovery had now been provided, and dismissal, or any other sanction, was not appropriate.

On August 1, 2001, the court conducted a hearing on appellant's motion to dismiss, and heard testimony as to the police department's failure to turn over Officer Schnoor's investigative notes. Officer Schnoor testified that when she was at the bank, Chief Tacheira was speaking to the bank tellers about the robbery and Officer Schnoor took notes as the tellers talked about the robbery, the suspect's description, and where they were standing during the incident. Officer Schnoor did not file a report based on these notes, but instead turned them over to Detective Lopez because he was conducting the investigation.

Officer Schnoor also testified that her notes contained a reference to a goldish-colored Lincoln Town Car with Hispanic juveniles, but this information was not contained in Detective Lopez's report. However, Schnoor testified that this information was based on another call she received in May 2000 from a teacher concerned about students being on the school grounds. Officer Schnoor, the school resource officer, investigated the teacher's complaint, and determined the people in the gold Lincoln were students who "were out of Firebaugh and they were screaming obscenities at the softball girls' team after school." Officer Schnoor received this information after she left the robbery investigation at the bank that day. Officer Schnoor acknowledged this information was on the same page in her notebook as her robbery notes. However, she

carried only one notebook and thought she distinguished this information as based on a different subject.

On cross-examination, Officer Schnoor conceded that when she examined her notes in March 2001, she was not sure about the references to the gold Lincoln Town Car in her notes, and told the district attorney's office that she received the information prior to the bank robbery. About a month later, she remembered that she received this information after the robbery, but failed to tell the district attorney's office or anyone in the police department that she made a mistake.

Detective Lopez also testified at this hearing, and acknowledged he received Officer Schnoor's notes about the robbery. Lopez testified his report contained the same information as in Schnoor's notes, but he didn't include details about the gold Lincoln Town Car.

Appellant argued the second information should be dismissed because the police had withheld exculpatory information, and only disclosed Officer Schnoor's notes after the mistake was revealed during the first trial. Appellant challenged Schnoor's testimony about the gold vehicle being unrelated to the bank robbery investigation, and asserted the vehicle reference was in the middle of her robbery notes.

The court was concerned about the references to the gold vehicle in Officer Schnoor's notes, and Detective Lopez's failure to mention anything about the gold vehicle in his report. The court asked Detective Lopez to explain the omission. Lopez testified that when he received Officer Schnoor's notes, he asked her about the gold vehicle. Schnoor told him about the teacher's report about the Hispanic students who harassed the females, and one of the softball coaches had written down the vehicle's description. Lopez decided the gold vehicle was not connected to the robbery and didn't include the information in his report.

After hearing the evidence, the court found the robbery investigation had not been "a model of police efficiency," but it did not share appellant's view that the information

about the gold vehicle was involved with the robbery. The court denied appellant's motion to dismiss, and his second jury trial began.

The record infers that during the second jury trial, Sergeant Simmons testified about finding the handgun during the consent search of the house where appellant lived with his grandparents, that he found this weapon on the day of the robbery, and he wrote a report which documented these observations.

On August 7, 2001, in the midst of appellant's second jury trial, defense counsel informed the court that he had not received copies of the report made by Sergeant Simmons about finding the handgun, and moved to dismiss the case based on a due process violation. The court denied the motion without prejudice. Defense counsel then moved for a mistrial. The court advised the prosecutor that a mistrial would be granted unless the prosecution presented compelling evidence to the court the next day.

On August 8, 2001, defense counsel advised the court that he located one of the reports in question, but he still did not have the report about the search of appellant's house. The prosecutor presented the court with a discovery compliance sheet signed by defense counsel, indicating his receipt of Sergeant Simmons's report of May 11, 2000, and defense counsel conceded that report had been received. However, defense counsel still did not have the June 1, 2000, report, which apparently mentioned the handgun found at appellant's house on May 11, 2000.

The court asked the prosecutor if he intended to rely on the handgun found at appellant's house. The prosecutor replied the weapon was found at the house, it fit the description of the robbery weapon, and Sergeant Simmons saw and handled it. The weapon was not seized because appellant's grandfather said the gun would be available to law enforcement officers if they needed it later. However, the gun wasn't found when the search warrant was executed on June 1, 2000, and "the grandfather then changes his story and says, well, oh, that gun was stolen a year and a half ago, when it was in Sgt.

Simmons' hands two weeks prior.” Defense counsel stated he had not received any reports about this incident.

The court granted appellant's motion for mistrial, and the prosecutor asked for clarification. The court found defense counsel did not receive Sergeant Simmons's report, and the court believed defense counsel would not have “made the statement that he made to this jury in his opening statement if he knew about this report.”⁷ The court also noted the prosecutor “just told us that you got something new that you haven't discovered to him, that you served a subpoena on [appellant's] grandfather and that he says, wait a minute, that gun was stolen a year ago. [Appellant is] entitled to have that sort of information for preparing his defense” The prosecutor didn't intend on calling the grandfather. The court stated that appellant was entitled to advance notice of this information. The prosecutor insisted defense counsel knew about this fact. Defense counsel stated there was one line in Detective Lopez's report that an officer “saw a weapon but did not seize it,” without further details.

The court also noted the prosecutor's representation that the gun matched the description of the robbery weapon was inconsistent with Sergeant Simmons's recent testimony at the second trial, because Simmons described the weapon as “old, unworkable . . and his own testimony was he was confused about what the description was by the officers.”

The prosecutor again asked for clarification of the reasons for the mistrial, and the court stated the reason was the prosecution failed to provide appellant with Sergeant Simmons's supplemental report. The prosecutor then asked defense counsel whether he received the report about the search warrant, which stated the gun was not found during

⁷ The record infers that in his opening statement in the second jury trial, defense counsel stated the police never found a gun in the case.

the search. Defense counsel conceded he had the search warrant report, but there were no statements from the grandfather about the gun allegedly being stolen.

“[THE PROSECUTOR]: I want to be clear about what information is missing so that we know why we’re having a mistrial.

“THE COURT: Well, the mistrial has nothing to do with that. That’s just something that I think he’s certainly entitled to know about so he can call the grandfather if he wants to.”

The court tried to schedule the next trial but the prosecutor again asked the court to reconsider the mistrial.

“[THE PROSECUTOR]: In – in looking at the evidence or the reports that were not discovered or that the court is finding were not discovered, the central issue seems to be this grandfather and – and I’m assuming that the central issue would be that [defense counsel] hasn’t time to interview the grandfather and to discuss those issues with him.

“THE COURT: Are you talking about why the motion was granted? The answer is no. The motion was granted because I find that he did not – was not discovered that two-page report. I brought up the business about the grandfather because I think if there is – if there is a report which says that the grandfather has changed his story from what Sgt. Simmons says that he said to him on the night of the 11th of May, he is entitled to that report because Simmons or somebody is going to come in and talk about it. He’s entitled to have a report of that incident. Now, if he’s got it, that’s fine. If he doesn’t have it, please give it to him.”

C. The Third Trial

On August 29, 2001, appellant’s third jury trial began. As set forth above, defense counsel extensively cross-examined the law enforcement officers as to the investigative defects in this case, and their failure to timely prepare and disclose notes and reports. During the instructional phase, defense counsel requested pinpoint instructions to attack the police department’s alleged incompetent investigation. Appellant argued such instructions were proper regardless of whether the investigative deficiencies were intentional or negligent. The court denied appellant’s request for these non-CALJIC

instructions without comment. In closing argument, defense counsel strongly attacked the police department's conduct of the case. Appellant was convicted as charged.

D. The Posttrial Motion to Dismiss

Appellant filed a posttrial motion to dismiss his convictions in this case for “outrageous police conduct” in violation of his due process rights. Appellant's motion, which was nearly identical to the motion to dismiss the second information, was based on the prosecution's previous failures to turn over Officer Schnoor's notes about the gold Lincoln Town Car, and Sergeant Simmons's report about finding the handgun during the consent search of appellant's grandfather's house.

Appellant's motion again relied on *Russell, supra*, 411 U.S. 423, and *Thoi, supra*, 213 Cal.App.3d 689, and raised the same due process issues as in his previous motion to dismiss the second information. Appellant did not allege any specific facts to support his due process claim, but again asserted the delayed disclosures were prejudicial because “the memories of witnesses and those named in the notes have faded and some of those named/mentioned in said notes can no longer be found.” Appellant further asserted the police engaged in a pattern of conduct to conceal information and surprise the defense at trial. “The bad faith of the police is evident in their failure to turn over said information/documents until their deception was discovered—on two (2) separate occasions.”

Appellant's motion to dismiss did not raise any issues as to the police department's failure to seize the gun found at the grandfather's house. The motion did not rely on either *Trombetta* or *Youngblood*, or assert the police failed to preserve exculpatory evidence during the investigation.

Appellant separately filed a motion for new trial based on the insufficiency of the evidence linking him to the bank robbery. Appellant argued there was no physical evidence that identified him as the robber, and also challenged the firearm enhancements based on the bank tellers' statements that the suspect's gun looked fake. “No handgun

was ever found in this case, regardless of the testimony of Officer Simmons which lacked any credibility whatsoever and was directly contradicted by Detective Lopez.”

The prosecution’s opposition to the motion to dismiss again refuted appellant’s allegations about the relevance of Officer Schnoor’s notes. The prosecutor also noted appellant had ample time to investigate these issues but failed to set forth any new evidence or facts to establish prejudice, based on either the Schnoor or Simmons reports. The prosecutor again challenged appellant’s reliance on *Thoi* and argued a motion to dismiss for “outrageous police conduct” was only applicable to entrapment situations. As in his previous opposition, the prosecutor addressed the possible application of *Trombetta* and *Youngblood*: “If [appellant’s] motion was intended to be a Trombetta motion, then he has also failed to meet his burden.” The prosecutor again noted appellant’s motion should have been based on a *Brady* discovery violation, but appellant was not entitled to a dismissal for a discovery violation, and *Brady* error could only result in a new trial. Appellant failed to satisfy *Brady*’s requirements for a new trial, and his motion to dismiss should be denied.

On November 20, 2001, the parties submitted the matters and the court denied appellant’s motion to dismiss.

“I will state for the record that this was certainly not the most sophisticated investigation that I have encountered or the best example of a police department cooperating not only with the defense attorney but with the district attorney in providing promptly relevant information, however, I do not find that the conduct has prejudiced [appellant] or rises to that level of outrageous conduct which would warrant a dismissal.”

The court then denied appellant’s motion for new trial:

“I find that the evidence in this case, in the Court’s opinion, is overwhelmingly indicative of guilt, and that [appellant’s] spending habits while in the days following the robbery while they indicated some significant relationship to the robbery, was not the only evidence of his guilt, there was the testimony concerning Mr. Pounds and his encounter with the robber while driving [appellant’s] vehicle. And the statements of

Mr. Pounds and Mr. Ramirez which while denied at trial, I found not to be worthy of belief in view of what they told the police.”

Defense counsel asked if the court was going to address “the gun issue and the new trial?” The court replied:

“Well, as far as the gun is concerned this is the most serious failure of proper investigative methods in my opinion that occurred in this case. It is inconceivable to me that an officer seeing a gun which is alleged to have resembled that used in the robbery would leave it in the house regardless of what his grandfather might have said. In particular, I’m particularly concerned by the circumstances under which a police report concerned that incident arose.”

E. Analysis

On appeal, appellant contends the police department violated his due process rights by failing to preserve the gun allegedly found at his grandfather’s house during the consent search on May 11, 2000. Appellant relies on *Trombetta* and *Youngblood*, and asserts his convictions must be dismissed because of the failure to preserve exculpatory evidence for testing which, he argues, would have eliminated that gun as the robbery weapon. Appellant contends his motions adequately preserved the *Trombetta* and *Youngblood* issues, given the prosecution’s reliance on these cases to argue the motions were meritless.

“Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence “that might be expected to play a significant role in the suspect’s defense.” (*California v. Trombetta*[, *supra*,] 467 U.S. 479, 488; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 976.) To fall within the scope of this duty, the evidence “must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” [Citations.] The state’s responsibility is further limited when the defendant’s challenge is to “the failure of the State to preserve evidentiary material of which no more can be said than

that it could have been subjected to tests, the results of which might have exonerated the defendant.” (*Arizona v. Youngblood*[, *supra*,] 488 U.S. 51, 57.) In such case, “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” (*Id.* at p. 58; accord, *People v. Beeler*, *supra*, 9 Cal.4th at p. 976.)’ [Citation.]” (*People v. Catlin* (2001) 26 Cal.4th 81, 159-160; *People v. Farnam* (2002) 28 Cal.4th 107, 166.)

The prosecution’s failure to retain evidence violates due process only when that evidence “might be expected to play a significant role in the suspect’s defense,” and has “exculpatory value [that is] apparent before [it is] destroyed.” (*Trombetta*, *supra*, 467 U.S. at pp. 488-489, fn. omitted.) In that regard, the mere “possibility” that information in the prosecution’s possession may ultimately prove exculpatory “is not enough to satisfy the standard of constitutional materiality” (*Youngblood*, *supra*, 488 U.S. at p. 56, fn. *; *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 8.)

Thus, when the prosecution fails to retain evidence that is potentially useful to the defense, there is no due process violation unless the accused can show bad faith by the government. (*Youngblood*, *supra*, 488 U.S. at p. 58; *City of Los Angeles v. Superior Court*, *supra*, 29 Cal.4th at p. 8.) “The presence or absence of bad faith by the police ... must necessarily turn on the police’s knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.” (*Youngblood*, *supra*, at pp. 56-57, fn. *; *People v. Frye* (1998) 18 Cal.4th 894, 943.)

On review, we must determine whether, viewing the evidence in the light most favorable to the superior court’s finding as to the issue of exculpatory evidence, there was substantial evidence to support its ruling. (*People v. Griffin* (1988) 46 Cal.3d 1011, 1022; *People v. Roybal* (1998) 19 Cal.4th 481, 510.) However, a defendant’s failure to raise *Trombetta* and *Youngblood* issues below necessarily waives consideration of the issue on appeal. (*People v. Williams* (1997) 16 Cal.4th 635, 661-662.)

There are several problems with appellant's contentions. First, appellant's claim that the police department failed to seize and preserve the gun in violation of *Trombetta* and *Youngblood* is not an issue properly before this court because appellant did not object to the admission of Sergeant Simmons's testimony on this ground. (*People v. Williams, supra*, 16 Cal.4th at pp. 661-662.) Indeed, appellant never raised *Trombetta* and *Youngblood* issues in any of his three trials. His objections to the police department's belated disclosures of evidence were solely based on "outrageous police conduct," and he expressly relied on *Russell, supra*, 411 U.S. 423 and *Thoi, supra*, 213 Cal.App.3d 689.

As the prosecution repeatedly noted, however, "outrageous police conduct" originated as a defense theory solely based on entrapment issues. As the court explained in *Thoi, supra*, 213 Cal.App.3d at page 695, the genesis of the defense was "a casual comment" in *Russell* that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction," (*Russell, supra*, 411 U.S. at pp. 431-432, quoted in *Thoi, supra*, at p. 695, fn. 2.) *Thoi* rejected the application of the outrageous police conduct defense, finding it subsumed by the entrapment defense:

"In cases where the thrust of the defense is that the government improperly instigated the crime, outrageous police conduct is a corollary of entrapment under California law. This is so because in California, the focus in entrapment cases is on the actions of the police. Where their actions would tend to cause a reasonable law-abiding person in the defendant's position to commit a crime he otherwise would not commit, entrapment will be found even though the person has a predisposition to commit the crime.

[Citation.] The converse is true under federal law. There, entrapment does not exist unless the defendant had no predisposition to commit the crime.

[Citation.] [¶] Thus, under federal law, there is a rationale for the defense of outrageous police conduct in entrapment-type situations. The conduct of the police may be so egregious that the sanction of dismissal would be appropriate notwithstanding the defendant's propensity to commit the crime. In California, where entrapment law looks primarily at the conduct of the authorities in the first instance, the defense of outrageous police

conduct is superfluous. We hold the doctrine does not exist separately within the context of entrapment cases.” (*Thoi, supra*, 213 Cal.App.3d at p. 696, fn. omitted; but see *People v. Holloway* (1996) 47 Cal.App.4th 1757, 1765-1767, disapproved on another ground in *People v. Fuhrman* (1997) 16 Cal.4th 930, 947, fn. 11.)

Thus, it cannot be said that appellant’s motions to dismiss, based on *Russell* and *Thoi*, necessarily raised or preserved *Trombetta* and *Youngblood* claims as to the police department’s failure to preserve exculpatory evidence, and appellant has waived this issue for purposes of appeal.

Appellant anticipates this waiver argument, but asserts the prosecutor’s oppositions to his motions conceded the existence of *Trombetta* and *Youngblood* issues based on the police department’s failure to preserve evidence. As set forth above, the prosecutor’s oppositions repeatedly noted appellant was relying on the wrong authority in *Russell* and *Thoi* and his motions were meritless. In an abundance of caution, the prosecutor alternatively argued that if appellant was relying on *Trombetta* and/or *Youngblood*, he had completely failed to establish the exculpatory nature of the evidence or bad faith. The prosecutor also argued appellant’s motions should have been based on *Brady* discovery violations, but even *Brady* didn’t support dismissal as a sanction.

In addition, the trial court denied appellant’s motions to dismiss for “outrageous police conduct,” and relied on the discovery violations when it granted the mistrials. The court never addressed or relied on *Trombetta* and/or *Youngblood* to grant either of the two mistrials. While the court was disturbed by the police department’s ineptness, it never addressed whether any of the undisclosed evidence was exculpatory or whether the police acted in bad faith.

Second, even if appellant’s final motion to dismiss was based on *Trombetta* and *Youngblood*, the motion was expressly limited to the police department’s earlier failures to turn over Officer Schnoor’s notes and Sergeant Simmons’s report. These failures were the reasons for the first and second mistrials. Appellant’s final motion to dismiss never

asserted the police violated *Trombetta* and *Youngblood* by failing to seize the weapon found in the grandfather's house during the May 11, 2000, consent search, and the court was never asked to address the alleged exculpatory value of the gun or the officers' purported bad faith. In addition, appellant never moved to strike Sergeant Simmons's trial testimony about his discovery of the gun. Instead, defense counsel skillfully relied on the investigative missteps to challenge the credibility of Simmons and the other officers. There is nothing in the instant record to infer that appellant was trying to raise *Trombetta* and *Youngblood* issues as to the gun itself.

Third, appellant's *Trombetta* and *Youngblood* claims suffer from a serious flaw as to whether the police actually *seized* or *obtained* the gun to trigger the duty to preserve exculpatory evidence. A series of cases have discussed whether *Trombetta* and *Youngblood* apply to situations in which the police have failed to seize or collect evidence. For example, in *People v. Hogan* (1982) 31 Cal.3d 815, the police failed to obtain fingernail scrapings from the victim. *Hogan* noted that the police duty to obtain exculpatory evidence is not as strong as its duty to preserve evidence already obtained. (*Id.* at p. 851.)

In *People v. Daniels* (1991) 52 Cal.3d 815, the police found someone associated with a murder suspect about four hours after two officers were fatally shot. The police considered testing this person's hands for gunshot residue, but decided not to because her emotional state convinced the officer that she was not the killer, it was four hours after the shooting, and she had driven a car and handled various objects during that period. The defense moved to dismiss the charges because of the police department's failure to test the person's hands for gunshot residue and preserve exculpating evidence. In rejecting defendant's *Trombetta* claim, *Daniels* cited *Hogan* and held: "We know of no authority that would require the police to obtain and preserve evidence under circumstances comparable to the present case." (*Id.* at p. 855.) *Daniels* further concluded that even if a residue test would have been reliable, there was nothing in the

record to suggest the result would have been exculpatory. Defendant never presented any evidence this person fired a gun, and failed to show the existence of evidence of exculpatory value, or, for that matter, that any exculpatory value was apparent at the time to the officers who contacted the suspect. (*Ibid.*)

In *People v. Webb* (1993) 6 Cal.4th 494, involved a situation similar to the instant case. A narcotics task force executed a search warrant at the apartment of a murder suspect's girlfriend, who was also subject to a parole search condition. An officer found a weapon, which constituted a parole violation, and it was inventoried and placed in an evidence bag. However, the police inadvertently left the weapon in the girlfriend's apartment. Defendant was in custody and repeatedly called the girlfriend and told her to get rid of the gun. The girlfriend tried to dismantle and dispose of the weapon. The officers eventually recovered the dismantled gun, which had some similarities to the fatal bullets, but rust and corrosion prevented any conclusive analysis. (*Id.* at pp. 506-508.)

In *Webb*, defendant relied on *Trombetta* and argued that if the police had not failed to confiscate the gun during the parole search of the girlfriend's apartment, it would not have deteriorated and it might have been conclusively eliminated as the murder weapon. The People asserted there was no official duty to preserve the evidence because the police never physically removed the gun from the girlfriend's apartment. *Webb* noted "'the police duty to obtain exculpatory evidence is not as strong as its duty to preserve evidence already obtained.'" (*People v. Webb, supra*, 6 Cal.4th at p. 519, fn. 18, quoting *People v. Daniels, supra*, 52 Cal.3d at p. 855.) Based on the circumstances, however, the court concluded the police had seized, inventoried, and bagged the gun during the parole search and, but for an admitted oversight, would have taken it into custody, and the gun was therefore "'obtained'" by the police for purposes of *Trombetta* and *Youngblood*. (*People v. Webb, supra*, at p. 519, fn. 18.)

Webb rejected defendant's *Trombetta* and *Youngblood* claims, and noted that defendant's girlfriend, rather than a police officer, was the person who failed to preserve the gun:

"We doubt the foregoing cases create an official duty to protect evidence from a suspect's own deliberate attempts to destroy it. The due process principles invoked by defendant are primarily intended to deter the police from purposefully denying an accused the benefit of evidence that is in their possession and known to be exculpatory. [Citation.] Here, however, police conduct in leaving the revolver in [the girlfriend's] apartment can 'at worst be described as negligent.' [Citation.] It was defendant who—evidently concerned about the gun's inculpatory value—frightened [the girlfriend] into disposing of it Common sense suggests that defendant, not the police, should be held accountable for any ensuing damage that made it impossible to conclusively identify or eliminate the gun as the murder weapon." (*People v. Webb, supra*, 6 Cal.4th at pp. 519-520.)

Webb also concluded the gun never had any discernable exculpatory value.

"... Officer Miller testified that he attempted to confiscate the gun along with two other weapons because he believed that [the girlfriend] and defendant, as ex-felons, were prohibited from possessing firearms. Thus, in any narcotics prosecution or parole revocation hearing arising out of the search of [the girlfriend's] apartment, the revolver might have been relevant only insofar as it formed the basis of additional criminal charges against defendant. [¶] As noted by the trial court, the revolver also had no known connection to the capital crimes at the time the narcotics task force purportedly mishandled it. Testimony by [the officers] indicated that officials were not aware of defendant's possible involvement in the murders until [the girlfriend] contacted [the police] three months after the task force searched her apartment." (*People v. Webb, supra*, 6 Cal.4th at p. 520.)

In the instant case, it is a close question whether Sergeant Simmons actually *seized* or *obtained* the gun at the grandfather's house, within the meaning of *Trombetta* and *Youngblood*. In contrast to *Webb*, Simmons did not inventory the weapon or place it in an evidence bag. He merely examined the weapon, determined it was pitted and rusting, and watched as appellant's grandfather demonstrated the defective cylinder. Simmons expressly testified that he didn't intend to seize the weapon because he didn't have a warrant and he didn't know who was the suspect, even though appellant was subject to a

parole search condition. The grandfather maintained custody and control over the gun, and promised to make it available to the officers upon request.

Appellant attempts to impart a duty upon Simmons to seize the gun simply because he had “a legal right to do so,” based on the possible parole violation. Appellant also complains there was no way defense counsel could have obtained the gun which Simmons examined because “it was gone by the time the defense was notified of its existence.” Appellant states there was no way for the defense to secure access to the gun because “there was no evidence that the gun in question was under [appellant’s] control.” As in *Webb*, however, appellant’s protestations ignore the fact that the gun was in the house where appellant lived with his grandparents. Appellant was not arrested that day, and he continued to live at that residence for two more weeks until he was finally arrested on May 26, 2000. While defense counsel may not have been present on May 11, 2000, appellant and his grandfather maintained control and access to the house where the gun was found.

Finally, even if appellant’s *Trombetta* and *Youngblood* claims are considered on the merits, it is highly unlikely that this weapon possessed any exculpatory value. Appellant and respondent have reached contrary inferences from the trial testimony about the gun. The bank tellers described the robbery suspect’s gun as a shiny, chrome revolver with molding lines on the sides. Sergeant Simmons testified the gun he examined at the grandfather’s house was pitted and rusting. Appellant contends the gun at the grandfather’s house didn’t match the description of the subject gun, and it was exculpatory and should have been seized for further tests as to DNA and/or fingerprints. In contrast, respondent argues the “patina-streaked” gun actually matched the description given by the bank tellers.

Contrary to respondent’s view, the record strongly suggests the gun at the grandfather’s house did not match the tellers’ description of the robbery weapon. As in *Webb*, however, there was no discernable exculpatory value to the gun at the time that

Simmons examined it. At most, the presence of the weapon might have constituted a parole violation for appellant. In addition, the officers returned with the search warrant after learning from Fernando Ramirez that appellant used a gun from the grandfather's gun cabinet to commit the robbery, and had returned the weapon to the cabinet. There was no evidence that Simmons found the rusty weapon in such a cabinet.

Appellant further argues "the gun's potentially exculpatory value was due in part to the fact that it should have been preserved in order to test it for appellant's DNA and fingerprints" The gun had already been handled by Simmons and the grandfather, and appellant's DNA was not found on the most inculpatory evidence in the case, the latex glove found in his car. Appellant's bad faith arguments are similarly meritless. The record indicates the Dos Palos Police Department was rather overwhelmed by the first bank robbery in the history of the city. Their missteps thwarted what should have been a relatively straight-forward investigation, based on Mr. Lemos's observations of the man in the blue hooded sweatshirt throwing the bag into appellant's car, driven by Edgar Pounds, and the subsequent statements of Pounds and Fernando Ramirez which implicated appellant.

We thus conclude that appellant failed to preserve any *Trombetta* and *Youngblood* objections to the introduction of evidence about the gun. Even if the issue was raised, it is a close question as to whether the police seized or obtained the gun to trigger the duty to preserve evidence. There was no obvious exculpatory value to a gun which did not match the robbery weapon, and the police department's incompetence did not amount to bad faith.

II.

THE PINPOINT INSTRUCTIONS

In the alternative, appellant contends the court should have given one of his requested pinpoint instructions on the effect of the police department's failure to preserve the gun and timely turn over Sergeant Simmons's report about the gun. Appellant argues

the court's refusals to give the requested instruction or tailor the instruction to overcome any prosecutorial objections were prejudicial.

A. Background

At appellant's third trial, defense counsel requested pinpoint instructions to address the police department's alleged incompetent investigation. Appellant argued such instructions were proper regardless of whether the investigative deficiencies were intentional or negligent. Appellant requested the following instruction, based on *U.S. v. Schyllon* (D.C. Cir. 1993) 10 F.3d 1, 3:

“If you find that the police inadequately investigated one matter, you may infer that the prosecution also inadequately investigated other matters. Based on this inference alone you may disbelieve the prosecution witnesses and evidence. This may be sufficient by itself for you to have a reasonable doubt as to the defendant's guilt.”

Appellant also supplied two alternative versions of his requested pinpoint instruction.

The first alternate version was based on *People v. Wimberly* (1992) 5 Cal.App.4th 773:

“Inadequate or incomplete investigation by the prosecution may support an inference adverse to the prosecution which may be sufficient to leave with a reasonable doubt as to the defendant's guilt.”

The second alternate version was adopted from “Hrones & Czar, Criminal Practice Handbook (Lexis, 1998) Sec. 5-17(b)(1) Inst. No. 19.”

“You have heard testimony in this case concerning the government's failure to [investigate] [conduct certain tests]. The failure of the government to so [investigate] [conduct these tests] is relevant to the issues presented by this case. In evaluating the credibility and weight of the evidence, consider the [lack of investigation] [failure to conduct certain tests].

“From the fact that the government did fail to [investigate] [conduct certain tests] [follow certain police procedures], you may draw an adverse inference against the government, which may leave you with a reasonable doubt as to the defendant's guilt. When potential evidence is not pursued by the party in the best position to make such an investigation, one may infer that the potential results of that investigation would be unfavorable to the party's cause.”

The court, without comment, denied appellant's request for these non-CALJIC instructions over defense counsel's objections.⁸

In closing argument, defense counsel attacked Sergeant Simmons's credibility as to whether he really found a gun at the grandfather's house on May 11. Simmons had consent to search the house and knew appellant had a parole search condition.

"... And yet he sees this gun and doesn't seize it? [¶] Is that reasonable to believe? You know it's not. Is it reasonable to believe that he saw this gun and yet he didn't tell Detective Lopez, the investigating officer, about it? No. And Detective Lopez told you yesterday Sgt. Simmons never mentioned anything about this revolver that he found out there? [¶] Is it reasonable to believe that if Sgt. Simmons had found this gun out there on May 11th that that statement would have been included in the affidavit for search warrant? Well, sure, if he'd found it, it'd be here.... It's not there. He never mentioned it 'cause he never saw it. [¶] And isn't it funny about the timing of the report. Sgt. Simmons doesn't even make a report saying that he found this gun on May 11th until after the police go out on June 1st and serve the search warrant and don't find the gun. It's only then that, oh, geez, you know, here's this report, I found a gun out there on the 11th. The search warrant was executed on June 1st. Sgt. Simmons told you his report was done that day as well."

Defense counsel also attacked Officer Howard's credibility about seeing appellant and Edgar Pounds prior to the robbery:

"... Officer Howard who made no report about this for about 11 months after the incident occurred and then did it based only on memory. And he must have a really good memory because he told you, you know, the reason I didn't do that report, this one-page report, and I remembered all these details is because I just had so many cases, I was so busy I just couldn't find the time to get around to it. Is that reasonable? Does that make sense? You know it doesn't."

⁸ As relevant to the discussion in section I, *ante*, appellant's request for the pinpoint instruction as to the police department's general failure to investigate cannot be interpreted as preserving a *Trombetta* and *Youngblood* objection to their failure to seize the gun from the grandfather's house.

Defense counsel further noted the police failed to investigate the information in Officer Schnoor's notes, which were belatedly disclosed to the defense, because the police already decided appellant was the robber:

“... Yet Detective Lopez told you we didn't bother to do any investigation on those people either. The information was not only ignored, it wasn't even disclosed. It was buried. It wasn't put into any of Detective Lopez's reports regarding this matter or any reports regarding this matter, and it wasn't even turned over to the district attorney and the defense until almost a year had passed.”

B. Analysis

Appellant contends that even if the court was unwilling to grant his motion to dismiss, it should have granted his request for one of these pinpoint instructions as the appropriate remedy for the police department's failure to preserve material evidence.

Upon request, a trial court must give jury instructions that pinpoint the theory of the defense, but it can refuse instructions that highlight specific evidence as such. (*People v. Earp* (1999) 20 Cal.4th 826, 886.) “Because the latter type of instruction ‘invite[s] the jury to draw inferences favorable to one of the parties from specified items of evidence,’ it is considered ‘argumentative’ and therefore should not be given.” (*Ibid.*)

While the court is required to give instructions which properly pinpoint the theory of the defense, it is not obliged to give instructions which “improperly impl[y] certain conclusions from specified evidence” (*People v. Wright* (1988) 45 Cal.3d 1126, 1137; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223.) *Wright* condemned instructions which “invite the jury to draw inferences favorable to [a party] from specified items of evidence on a disputed question of fact.” (*People v. Wright, supra*, at p. 1135.)

The trial court properly denied appellant's request for one of these instructions. Appellant's proposed language for the most part effectively argued the evidence by “highlight[ing] certain aspects ... without further illuminating the legal standards at issue [citations].” (*People v. Fauber* (1992) 2 Cal.4th 792, 865-866.) Appellant essentially

wanted the jury to find the entire investigation untrustworthy simply based on one of the missteps, such as Detective Lopez's failure to report on Officer Schnoor's notes. Appellant's proposed instructions raised improper inferences and presumptions, and were argumentative rather than appropriate pinpoint instructions.

Appellant also argues the trial court had a duty to tailor one of the proposed instructions instead of completely rejecting the request. However, the court need not instruct on its own motion on specific points developed at the trial. (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 297.) The court does not have a sua sponte duty to give pinpoint instructions. (*People v. Hughes* (2002) 27 Cal.4th 287, 361.)

Appellant claimed the first alternate version of the instruction was based on *People v. Wimberly, supra*, 5 Cal.App.4th 773. In *Wimberly*, defendant was convicted of multiple counts of murder, attempted murder, rape, and burglary. The police collected physical evidence relating to his crimes against the first of his victims. The police sergeant in charge of the property room, who believed that the evidence related only to a rape charge, permitted destruction of the evidence pursuant to an existing policy that provided for destruction of nonmurder felony evidence in the absence of movement in a case for two years. Defendant moved for sanctions, and the trial court found the prosecution's actions violated a discovery order, but the prosecution had not acted in bad faith. Therefore, instead of dismissing the charges, it instructed the jury that the improper destruction of evidence could support an inference adverse to the prosecution which may be sufficient to raise a reasonable doubt with respect to the charges relating to appellant's first victim. (*Id.* at pp. 791-792.)

Wimberly held the court acted within its discretion when it gave the instruction, rather than dismissing the charges, as a sanction for the discovery violation, given the police department's actual destruction of evidence. (*People v. Wimberly, supra*, 5 Cal.App.4th at pp. 792-793.) "... Here, the trial court informed the jury that the employees of the police department had destroyed evidence in violation of court order,

described the destroyed items, and concluded: ‘Because of the destruction of evidence after the Superior Court issued a discovery order, you may draw an adverse inference to the Prosecution in the proof of Counts 1, 2, 3, and 4 of the information [related to that evidence]. Such adverse inference may be sufficient to raise a reasonable doubt as to’ those counts.’” (*Id.* at p. 793.) A *Wimberly*-type instruction was not appropriate in the instant case because, as discussed above, there is no evidence the police department destroyed any evidence.

Even if such a pinpoint instruction should have been given, any error is necessarily harmless. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144-1145; *People v. Wright*, *supra*, 45 Cal.3d at pp. 1144-1152.) Indeed, the record reflects defense counsel ably exploited the police department’s investigative missteps in this case, and inferred the law enforcement witnesses were falsely testifying. Counsel challenged the veracity of Simmons’s explanations for not seizing the gun, and questioned whether such a weapon was actually found on May 11, 2000. Counsel questioned whether Officer Howard actually saw appellant and Edgar Pounds earlier on the day of the robbery, given Howard’s failure to prepare a report for nearly a year after the incident. Counsel also attacked Detective Lopez’s failure to include Officer Schnoor’s notes in his report, and his failure to investigate the connection of the gold Town Car to the robbery.

Despite these investigative missteps, the evidence against appellant was very strong. Edgar Pounds and appellant were observed together before the robbery, in appellant’s silver Thunderbird. Pounds dropped off appellant at the pizza restaurant, where he visited with James Maxey. A few minutes after appellant left, Maxey heard the police cars responding to the bank because of the robbery. Mr. Lemos observed Edgar Pounds driving appellant’s vehicle near the bank, and saw a person with a blue hooded sweatshirt throw a bag into the vehicle. Pounds later admitted that appellant was the man who threw the bag into the car, and appellant ran home and changed his socks because he was muddy. Appellant disappeared with the bag then had a mutual friend give \$200 to

Pounds. Fernando Ramirez admitted he saw appellant that afternoon, and appellant said that he had done it, consistent with their conversation the previous day about robbing the bank. We thus conclude that regardless of the police department's missteps in this case, any instructional error is necessarily harmless given the strength of the evidence.

DISPOSITION

The judgment and abstract of judgment are each modified as follows: The firearm personal use enhancement attached to count I is increased to 10 years and the firearm personal use enhancement attached to count II is reduced to three years four months. Appellant's aggregate term remains 19 years 4 months. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the modifications and provide copies to all appropriate agencies.

HARRIS, J.

WE CONCUR:

DIBIASO, Acting P. J.

GOMES, J.